95-1412 (2)

Supreme Court, U.S.
FILED
APR 1 1996

No. 95-142

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

MICHAEL V. BROWN,

Petitioner,

AND

GENEVA ENGLAND,

Petitioner,

V.

PLYWOOD PANELS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James E. Brydges, Jr.
Louis H. Lazaron
Taylor & Walker, P.C.
555 Main Street
1300 First Virginia Tower
Norfolk, Virginia 23514-3490
(804) 625-7300

Counsel for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

15 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the dismissal of appellant's complaint, due to the filing of the complainant after the expiration of the statutory period for filing, violates appellant's Seventh Amendment right to a jury trial?

2. Whether the internal rules of the Fourth Circuit Court of Appeals violated appellant's rights of equal protection and due process of law?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 10

I. Petitioners' Right To A Jury Trial Was Not Violated Since The Claims Were Dismissed After Determination On Undisputed Facts That The Claims Were Barred By The Statute Of Limitations 10

II. The Decision Of The Fourth Circuit Court Of Appeals Should Not Be Disturbed Due To Its Own Internal Rules 10

CONCLUSION 11

TABLE OF AUTHORITIES

Statutes, Rules and Regulations

Rule 29.6 2

NO. 95-142

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MICHAEL V. BROWN,

Petitioner/Appellant,

and

GENEVA ENGLAND,

Petitioner/Appellant,

v.

PLYWOOD PANELS, INC.

Respondent/Appellee.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. FACTS RELATING TO THE INDUSTRIAL SETTING.

Prior to July 5, 1991, Michael Brown ("Brown") and Geneva England ("England") worked as panel inspectors on the same production line for Plywood Panels, Inc.[1] at its plant in Chesapeake, Virginia. Brown and England were required to sit in a chair on a platform above a production line in which the panels moved away from the inspection platform and look for defects in panels which were to be sold to the public. Prior to July 5, 1991, the production line had a large roller, an "applicator roller", over which the panels passed as they moved away from the inspection platform. The "applicator roller" changed the angle of the panels so that the panels were no longer carried flat as carried on the production line; the applicator roller caused the panels to face the panel inspection in an upright position which allowed the inspector sitting in the chair on the platform to easily view the panels in a relaxed sitting position. The applicator roller allegedly facilitated inspection of the panels without straining a person's body.

In 1991, Brown and England were absent from the plant during its summer shutdown which occurred generally around the July 4th holiday. When Brown and England returned on July 5, 1991, after the summer

---

[1]Pursuant to Rule 29.6, Plywood Panels, Inc. has dissolved, is no longer a corporation and does not have a parent company and does not have a non-wholly owned subsidiary.

shutdown, the applicator roller was not a part of the production line and the lights near the inspector's chair which illuminated the panels had been changed.

Brown and England subsequently filed suit alleging causes of action of negligence in making the alterations to the applicator roller and lights and for failing to correct the situation after the employees complained about these two alterations.

B. FACTS PECULIAR TO BROWN

Brown claims that the removal of the "applicator roller" made difficult the job of inspecting the panels for bubbles, laminations, cracks, trash or other defects. Brown further claims that the change in the production line caused him to change his posture so that it "kept a strain constantly on my neck which caused my neck to get injured." After the changes in the production line, Brown immediately had difficulty seeing the panels and complained about the boards getting by him.

Prior to August, 1991, Brown complained to Gary Ricks about the changes which caused him to put his body in awkward positions and, as a result, caused stiffness and discomfort in his neck. Specifically, Brown complained that the change "kept a strain on your neck and back. . ."[2]

---

[2]Petitioner's recitation of facts in footnote 4 on p. 15 and 16 is incomplete and misleading. A more complete recitation follows:

(continued...)

[2](...continued)

Q. But the bottom line is, you were experiencing pain and stiffness in your neck at least as early as August of '91 and complained about it to Gary Ricks - -

A. Right.

Q. - - who as the person you would have complained to at the time?

A. Right. But, to tell you the truth, I didn't know that the job was causing the pain, I really didn't.

- - -

(A 73, 74)

Q. Just so that I'm clear, though, you did have pain and you were experiencing stiffness between July and August?

A. July?

Q. July '91 and August of '91.

A. I did.

Q. Okay.

A. '91?

Q. Yeah, after the change. After they made the change.

A. After the change?

Q. Yeah.

A. Wait a minute. Correction. I got stiffness in my neck and I could feel the strain, but really it didn't get worse enough for me to really start complaining about it until - -

Q. Until '92?

A. - - until '92 when I started going to the doctor.

(continued...)

---

[2](...continued)

Q. Okay. But it was a gradual worsening of whatever condition you had?

A. Right.

- - -

(A 60, 61)

Q. Okay. You told Gary Ricks about that?

A. Uh-huh.

Q. That it was causing you to become stiff?

A. I told him, yep, it was uncomfortable bending over, it cause you problems. My main problem was just trying to get them to put that roller back in there.

Q. Because is was causing you to look at the panels in an unnatural position?

A. Right.

Q. And that was causing you to experience some discomfort in your neck?

A. True

Q. All right. And that was what you told Gary Ricks at least as of August of '91?

A. I asked him could he put the roller back into the line because its hard to see the panels and see the bubbles and everything and that it kept a strain on your neck and back the whole time you be up there. He told me, I'm not going to put the roller back in there; don't ask me no more, and walked on away with an attitude.

Q. And you know that he had left by August of '91?

A. August '9i.

(continued...)

Brown first sought medical attention for his neck problems in March or May of 1992, when he went to see Dr. Westmeyer. Brown went to see Dr. Westmeyer for neck stiffness and pain which were the same problems about which he complained to Gary Ricks prior to August, 1991. Brown felt pain and stiffness in his neck at least as early as August, 1991, and complained about the pain and stiffness to Gary Ricks, the Plywood Panels' employee to whom the complaints would have been directed. The strain on Brown's neck and the pain and stiffness in his neck gradually worsened to require medical treatment. By history, Brown traces the pain which he had and which he now has to his initial complaints of pain to Gary Ricks.

---

[2](...continued)

- - -

(A 68, 69)

Q. Now the problems that you complained of to Dr. Westmeyer, were those the - - I think you said yo complained that your neck was stiff to Dr. Westmeyer. Was that the same type of thing that you complained about to Gary Ricks, that your neck was stiff?

A. I told Gary Ricks - - yeah, I told Gary Ricks it kept a strain on my neck and back sitting up there.

Q. Okay.

A. I told him, I said - -

Q. Because you could feel it? You could actually feel the strain?

A. Yeah, you can feel the strain. It was more like a - - when you bend over, it was more like the tension on both sides of your neck tighten up and all the pressure sit right there in the center of your back.

Dr. Frank Westmeyer, Brown's treating physician, stated that in March, 1990 Brown complained of neck pain without any specific neck injury. Brown stated that the neck problems started some time in 1990 after he started as an inspector. As a result of the history provided by Brown, Dr. Westmeyer agreed that as early as 1990 some injury existed which was related to the inspection process. Dr. Westmeyer stated that, based on the history and the initial report of problems, the job was causing the problems. Brown reported an identifiable injury to Dr. Westmeyer when Brown presented for treatment. Additionally, Dr. Westmeyer related the ongoing problems, all of which may not have been related to the work injury, to the original onset of pain.[3]

C. FACTS PECULIAR TO ENGLAND

England claims that the change in the production

---

[3]Petitioners' citation to Dr. Westmeyer's testimony is incomplete. The following questions and answers were provided.

(A 162)

Q. What I'm suggesting is that at least to the extent that his problems are ongoing and he's related that they at least started back when you wrote this note in July of '93, and he has reported having problems as far back as 1990.

A. Okay.

Q. You at least have to go back to that point. They may have gotten worse, it may have been an injury that was small and got worse, but there was some injury at least back in October of 1990; is that correct; as a result of the inspection process he was going through?

A. Yes.

line caused her to change her posture so that she immediately felt a strain in her back and neck. England immediately felt stiffness in her neck as well as pain.

England felt a tired, nagging ache which was associated with pain in her neck as of October, 1991 and she sought medical attention for this problem. She was experiencing a dull pain as early as October, 1991. In fact, England traces her present symptomatology back to this dull pain experienced in October, 1991, although the pain is currently greater in degree. England also made complaints to management on the first work day following the change in the production line.

Dr. Lawrence Morales, the treating orthopaedic surgeon for England, stated that repetitive trauma would be consistent with a herniated disk and you would rely upon the history of the patient in order to determine the date of onset. Also, the continued problems would be related to the initial onset.[4]

---

[4]Petitioner's citation to Dr. Morales' testimony is incomplete and misleading. The following were some additional questions asked of Dr. Morales:

(A 130)

Q. And, again, you would have to rely upon the patient for that?

A. Yes.

Q. And then you would expect that the symptoms would get worse over time, correct?

A. Yes.

Q. But they would all date back to the initial visit?

(continued...)

D. FACTS CITED BY PETITIONER WHICH ARE NOT IN THE RECORD

Both of Brown's surgical disc fusion procedures are not a part of the record. (Petition for Writ of Certiorari, p. 16.) Further, Brown's continued neck problems, inability to work and medicare benefits were not a part of the record. (Petition for Writ of Certiorari, p. 17.)

E. PETITIONERS' STATEMENT OF THE CASE IS INACCURATE

The statement of the case is inaccurate as to the record in several instances. As to the England case, Plywood Panels never claimed that England received a medical consultation on October 1991, but rather that she complained of neck pain as early as October 1991. (Petition for Writ of Certiorari, p. 19.) Further, England's onset of pain was clearly demonstrated as well before December 1993 in the record and at least two (2) years prior suit being filed. (Petition for Writ of Certiorari, p. 26.)

---

[4](...continued)

A. Onset.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' RIGHT TO A JURY TRIAL WAS NOT VIOLATED SINCE THE CLAIMS WERE DISMISSED AFTER DETERMINATION ON UNDISPUTED FACTS THAT THE CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

The Petition in this case solely represents the unwillingness of the Petitioner to accept the well reasoned opinions of the District Court and the Fourth Circuit Court of Appeals. The decision of each court were based upon the uncontroverted testimony of each plaintiff and the respective treating physician. Thus, the courts below properly granted judgment for the appellee on the record.

II. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS SHOULD NOT BE DISTURBED DUE TO ITS OWN INTERNAL RULES.

The petitioners' constitutional rights have not been affected by the opinion relating to their case not being published. The opinions relied upon by the Fourth Circuit Court of Appeals were published opinions. Thus, no constitutional right of these petitioners was affected.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals should be affirmed since plaintiff's claims are barred by the applicable statute of limitations and Virginia law and no constitutional right was violated.

Respectfully submitted,

Louis H. Lazaron
Counsel of Record
Taylor & Walker, P.C.
Post Office Box 3490
Norfolk, Virginia 23514-3490
Telephone (804) 625-7300
Facsimile (804) 625-1504

James E. Brydges, Jr.
Taylor & Walker, P.C.
Post Office Box 3490
Norfolk, Virginia 23514-3490
Telephone (804) 625-7300
Facsimile (804) 625-1504

Attorneys for Respondent